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In The
Supreme Court Of The United States

No. 82-247

OCTOBER TERM, 1982

MANCHESTER ENVIRONMENTAL COALITION
and
MICHAEL DWORKIN
Petitioners

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL
Respondents

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT ADDRESSING EVENTS OCCURRING SINCE THE DATE OF THE FILING OF THE PETITION

SUPPLEMENTAL BRIEF OF PETITIONERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI WITH ATTACHED APPENDIX

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QUESTION PRESENTED FOR REVIEW

Whether the denial, without opinion, of costs and attorneys' fees to a successful petitioner, suing for violations of the Federal Clean Air Act, 42 U.S.C. §7401 *et seq.*, violates §7607(f) of the Act.

PARTIES

The Petitioners are Manchester Environmental Coalition and Michael Dworkin (hereinafter, "Petitioners"). The Respondents are the United States Environmental Protection Agency, Connecticut Fund for the Environment, Inc., John Walton, The State of Connecticut, National Retail Merchants Association, National Realty Committee and International Council of Shopping Centers (hereinafter, "Respondents").

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RELEVANT STATUTE

42 U.S.C. §7607(f):

COSTS. In any judicial proceeding under this Section, the Court may award costs of the litigation (including reasonable attorney and expert witness fees) whenever it determines that such an award is appropriate.

STATEMENT OF PURPOSE FOR THE SUPPLEMENTAL BRIEF AND ARGUMENT

On August 11, 1982, the undersigned, pursuant to Supreme Court Rule 28.2, filed a Petition for Certiorari in the instant case. The Petition seeks review by this Court of an Order of the Court of Appeals for the Second Circuit denying Petitioners' Request for Attorneys' Fees and Costs under 42 U.S.C. §7607(f). Since Petitioners were partially successful in the case below and furthered the purpose of the Clean Air Act,[1] the denial of such fees and costs was contrary to all established precedent as of the date of filing.

On the same day that the undersigned filed this Petition for Certiorari, the Solicitor General, on behalf of the Administrator of the Environmental Protection Agency, filed a Petition for Certiorari raising a similar issue under 42 U.S.C. §7607(f), in the case of *Anne M. Gorsuch, Administrator,*

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[1]The government's untimely brief (see Supreme Court Rule 22.1) asserts that no fees are due petitioners in this case since the purposes of the Clean Air Act were furthered by the Court and not the petitioners. However, even assuming arguendo, the validity of this legal proposition, it draws no strength from this case as Petitioners, in fact, raised the new source construction moratorium both in their briefs and in oral argument. Appendix pages 1A - 3A. The government's position, if adopted by this Court, would seriously undermine the remedial purpose of the Clean Air Act while strengthening Petitioner's claim that review by this Court of this case is necessary.

Environmental Protection Agency v. Sierra Club and Environmental Defense Fund, Supreme Court Docket No. 82-242 (hereinafter, "*Gorsuch, Administrator v. Sierra Club, Et Al*). On October 18, 1982, the Court granted the Petition for Certiorari in said case.

In *Gorsuch, Administrator v. Sierra Club, Et Al,* No. 82-242, the Petitioners were awarded over $90,000.00 in attorneys' fees and costs by the United States Court of Appeals for the District of Columbia Circuit although they did not prevail on a single issue raised in the case. See Petition for a Writ of Certiorari in the case of *Gorsuch, Administrator v. Sierra Club, Et Al,* No. 82-242, at p. 6. Here, although partially prevailing below, the Petitioners were denied any fees or costs pursuant to the same Section of the Clean Air Act.

Thus, this case presents the reverse side of the issue raised by the government in *Gorsuch, Administrator v. Sierra Club, Et Al,* No. 82-242, since the Petitioners were denied attorneys' fees and costs, without a written opinion, in a Clean Air Act case in which Petitioners herein partially prevailed. The granting of certiorari in this case, with in tandem arguments to *Gorsuch, Administrator v. Sierra Club, Et Al,* No. 82-242, will provide the Court with an opportunity to resolve conflicting approaches taken by the Federal Courts in interpreting and applying 42 U.S.C. §7607(f) in a variety of factual situations, thereby providing guidance to both the Courts and the Bar.[2]

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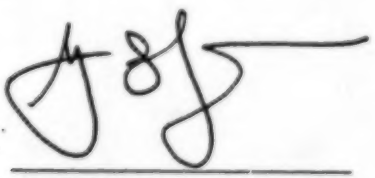
[2]The same issue has been raised in a Petition for Certiorari filed in *Save the Valley, Inc. v. Environmental Protection Agency,* Supreme Court Docket No. 82-637.

CONCLUSION

Petitioners respectfully request this Court to grant certiorari and schedule argument in tandem to *Gorsuch, Administrator v. Sierra Club, Et Al*, No. 82-242, so as to allow for a full determination of the various issues raised in both petitions.

Respectfully submitted,



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SECTION II OF REPLY BRIEF OF THE PETITIONERS MANCHESTER ENVIRONMENTAL COALITION AND MICHAEL DWORKIN FILED IN THE CASE BELOW

II. A SIP APPROVAL CONDITIONED UPON COMPLIANCE SUBSEQUENT TO THE EPA APPROVAL DATE VIOLATES THE CLEAN AIR ACT.

It is clear from reviewing respondents briefs that even they are confused about the effect and validity of the Connecticut conditional approval. For while EPA believes six elements of the Connecticut SIP were conditionally approved (EPA brief, footnote 12, p. 17), Connecticut states that only five portions of the SIP were conditionally approved. (Connecticut Brief at p. 17).

However, all the parties to this case are in agreement with one important fact: that the approved Connecticut SIP has deficiencies. The respondents argue that they are only *minor* deficiencies; while the petitioners and the Act itself, says nothing of minor or major deficiencies. (emphasis added). As the petitioner has argued in its brief, the Act requires full compliance not partial compliance. *Manchester Environmental Coalition v. EPA*, 612 F2d 56 (2d Cir. 1979).

In this regard, the United States Supreme Court held that the EPA cannot approve a SIP revision if the revision would prevent the SIP from meeting the requirements of 42 U.S.C. Sec. 7410(a)(2) (hereinafter Sec. 110(a)(2)). *Train v. NRDC*, 421 U.S. 60 at 71, 72. A plan that does not contain all of the criteria set forth in Sec. 110(a)(2) and in the case of Connecticut, the criteria in Part D of the act, is a plan that will be unable to control all sources of air pollution. Such a plan would curtail a state's ability to attain and maintain the National Ambient Air Quality Standards, (hereinafter the NAAQS). See *Union Electric Co. v. EPA*, 427 U.S. 246,

249-250, *Train v. NRDC*, supra at 78. Although attainment of the NAAQS may be delayed until a future date noted in the Act (in this case not later than December 31, 1983 or December 31, 1987, 42 U.S.C. Sec. 7502(a)(2)) the SIP must still meet the requirements of Section 110(a)(2) and Part D at the present time, not only in the future. *Train v. NRDC*, supra at 68.

By conditionally approving the Connecticut SIP, EPA has given a partially completed SIP all the benefits of a SIP which fully complied with Sections 110 and 172 of the Act. Since Section 110(a)(2)(I) calls for construction restrictions in states without an approved SIP on July 1, 1979; there is little doubt that Congress meant to insure full compliance with the important requirements of Sections 110 and 172. In Connecticut's case the conditional approval is extremely obnoxious because the elements that were conditionally approved would assist in the reduction of ozone air pollution, the cause of Connecticut's non-attainment status. Although the plan for these pollution controls should have existed on or before July 1, 1979 so that implementation could take place after July 1, 1979; the conditional approval effectively voided this possibility.

Even *McManus v. CAB*, 286 F2d 414 (CA2 1961) does not support the respondents thesis as the conditionally approved CAB order in that case was only valid after amendments were made to it. Moreover, neither *McManus v. CAB*, Id, or *National Air Carrier Association v. CAB*, 436 F2d 185 (CA.DC. 1970) have any application here as the conditional approvals given by the CAB were not at variance with a federal statute's requirements or an unlawful extension of a statute's mandates. Likewise, CAB conditional approval in *National Air Carrier Association v. CAB*, Id, merely approved with subsequent hearings to determine whether such approved order was adverse to the public interest. No regulations, studies or other requirements that would supply information necessary to comply with a federal statute needed to be completed. The present case is far different in that environmental inventories must be taken and regulations

must either be adopted or modified. Petitioner MEC's Brief Section IB. Furthermore, the CAB conditional approval dealt only with economic impacts and not the health of our country's citizens. When one considers that if Connecticut does not have a plan to attain the NAAQS two years after mandated by the Act, one could only speculate as to whether actual implementation to attain the NAAQS will ever take place?

Likewise, *Friends of the Earth v. EPA*, 499 F2d 1118 (CA 2, 1974), does not excuse Connecticut's full compliance with the Act. In this case, a plan to reduce parking in Manhattan business districts was approved although there was not specific mention of which off-street facilities would be eliminated. Since the Court found that the names of the off-street facilities which would be eliminated was essentially procedural; the plan was approved. In the present case, some of the SIP deficiencies call for the obtaining of information upon which to base regulations. At any time prior to the promulgation of regulations, disputes could arise as to the effectiveness of these future regulations. Accordingly, this case lends no support to EPA's action as it relates to the Connecticut SIP.

Finally, the conditional approval is really a mechanism that allows unhealthy air to stay unhealthy during a two year period that should have been utilized to actually implement what should have been planned two years ago. To have the EPA urging this Court to allow for a violation of the strict time requirements of the Act is most unfortunate. For if the agency charged with the duty of protecting our health from the effects of air pollution shirks its responsibility, then only this Court can remedy the defect.